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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-.....

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The opinion of the Court of Appeals has not yet been reported. That opinion is set forth in Appendix A.

The opinion of the United States District Court for the Western District of Pennsylvania has been reported at 452 F. Supp. 841 (W.D. Pa. 1978). That opinion is set forth in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on August 24, 1979.

An order denying rehearing was entered by the Court of Appeals on September 20, 1979.

It is believed that jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 (1).

Question Presented

Does a vessel owner satisfy its duty of care under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act if it provides a vessel in such a condition that an expert and experienced stevedoring contractor will be able, by exercising ordinary care, to load or discharge the cargo with reasonable safety to the longshoremen it employs?

Statute Involved

This case involves the interpretation and application of 33 U.S.C. § 905(b) which states:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Statement of the Case

Plaintiff, Thomas W. Griffith, commenced this action to recover damages for injuries sustained while unloading a barge owned by American Commercial Lines, Inc. (American), and in the possession of Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh) his employer. Jurisdiction of the district court was based upon 28 U.S.C. § 1333.

Prior to trial this case came before the Court of Appeals in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F. 2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), where it was held that Wheeling-Pittsburgh might be found liable to plaintiff for any negligence chargeable to it in the capacity of owner *pro hac vice*. The case was then remanded to the district court where trial was held before the Honorable Hubert I. Teitelbaum, sitting without a jury.

Judge Teitelbaum found that the accident occurred on May 26, 1973, on Barge 2730, which was owned by American (568a, 569a).[1] Three days earlier the Barge had been delivered to Wheeling-Pittsburgh and incorporated into its "coal fleet." (569a).

Plaintiff was not normally assigned stevedoring duties by Wheeling-Pittsburgh and, including the day of the accident, spent only three and three quarter days performing such duties (568a-569a). The day of the accident, plaintiff worked in a crew which was supervised part of the time by Joseph Allfree, Wheeling-Pittsburgh's River Foreman (570a). The only experienced riverman in the crew was one Joseph Armstrong (570a).

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[1] References are to the appendix filed with the Court of Appeals.

When the crew first began to load Barge 2730 it became apparent that the barge covers were difficu.. to move (570a). After some loading had been accomplished, Allfree directed that the covers be closed and then returned to his office away from the work area (570a).

In order to close a cover that had become stuck, a cable attached to a crane located on the seawall was attached to the stuck cover and a second cable was attached to a second cover for leverage (570a). Plaintiff and Armstrong stood on top of one of the covers to hold the hook at the end of the cable under the lip of the cover while tension was applied (570a). The cover was raised by the crane before plaintiff and Armstrong were able to reach a place of safety and both of them were precipitated into the hold (570a).

The District Court held that Wheeling-Pittsburgh in its capacity as owner *pro hac vice* was negligent in (1) failing to give adequate safety instructions to steelworkers unfamiliar with river work, (2) providing a defective barge for stevedoring work, and (3) failing to inspect, repair or reject the defective barge (573a). American was found to have been negligent in delivering a defective barge to Wheeling-Pittsburgh; specifically, a barge whose cover mechanisms were rusted and bent and which had the eyelets on the stuck cover completely missing (573a).[2]

Wheeling-Pittsburgh *qua* stevedore was found to have been negligent for not having the barge repaired before having its longshoremen work on it and for enlisting the aid of a novice while employing a questionable procedure for closing a stuck cover (574a).

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[2] Eyelets were only "missing" in the sense that the barge was not built with eyes in the center of the covers. The eyes were located at the quarter points of the ends of the cover and were all present (394a, Defendant's Exhibit 2, Plaintiff's Exhibit 9).

American was found to have been fifty percent negligent, Wheeling-Pittsburgh in its nonstevedoring capacity was found to have been twenty-five percent negligent and Wheeling-Pittsburgh as stevedore was found to have been twenty-five percent negligent (577a).

In addition to the above findings of fact, the information set forth below was shown by uncontroverted testimony.

Prior to delivery of Barge 2730 to Wheeling-Pittsburgh, American's Maintenance Supervisor, Franklin Merritt, visually inspected it but did not perform an operating inspection to see if the covers moved freely (11a, 23a).

Barge 2730 had eight covers, which were numbered 1 through 8 with 1 being nearest the bow (18a-19a). Each cover weighed slightly less than ten thousand pounds, about the weight of three normal-sized automobiles (402a).

Only covers 1, 2, 3, 4 and 5 were moved during the operations preceding the accident (200a-205a). Immediately before the accident, plaintiff and Armstrong were located on cover 3 attempting to hook the crane cable to the edge of that cover (212a-213a). The other cable was attached to cover 5 (212a). After the hook was attached to cover 3, plaintiff and Armstrong began to move toward the bow but the crane lifted cover 3, causing cover 2 to move away and sending plaintiff and Armstrong into the hole thus created (214a-215a).

Reasons for Granting the Writ

The decision rendered by the Court of Appeals is in conflict with decisions of other Courts of Appeals on the same matter. That is, the Second, Fourth and Fifth Circuits have held that the standard of care for vessel owners under the 1972 amendments to the Longshoremen's and Harbor

Workers' Compensation Act (LHWCA) is that set forth in Restatement (Second) of Torts §§ 343 and 343A.[3] *E.g., Canizzo v. Farrell Lines, Inc.*, 579 F. 2d 682 (2d Cir. 1978); *Munoz v. Flota Merchante Grand Combiana, S.A.*, 553 F.2d 837 (2d Cir. 1977); *Chavis v. Finnlines Ltd., O/Y*, 576 F. 2d 1072 (4th Cir. 1978); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (5th Cir. 1977). In this case the Third Circuit rejected this standard.[4] (Court of Appeals Opinion at 12a.) It is submitted that this conflict in the circuits requires resolution and should be resolved in favor of the standard adopted in the Second, Fourth and Fifth Circuits.

As originally enacted LHWCA did not define the legal actions available to an injured longshoreman beyond declaring that it constituted the exclusive liability of his employer. Act

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[3] These sections state:

"§ 343. Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees and,

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and,

(c) fails to exercise reasonable care to protect them against the danger.

"§ 343A. Known or Obvious Dangers.

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) [This subsection is omitted because it concerns a public utility's duties to the public.]"

[4] This standard has also been rejected by the Ninth Circuit. *Santos v. Scandia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979).

of Mar. 4, 1927, ch. 509, § 5, 44 Stat. 1426. While this statute was in force this Court held that a longshoreman could maintain an action against the vessel on which he was working for breach of the warranty of seaworthiness. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946). Such an action would lie even though the "unseaworthiness" was caused by inadequate equipment supplied by the stevedore. *E.g., Rogers v. United States Lines,* 347 U.S. 984 (1954). The shipowner did not normally bear the ultimate liability, however, because it was able to obtain indemnity from the stevedore for breach of the latter's implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956).

By the 1972 amendment to LHWCA Congress substantially increased the benefits provided under the Act, and restricted the other remedies available to an injured longshoreman. It abolished the vessel's liability for unseaworthiness and the stevedore's warranty of workmanlike service. 33 U.S.C. § 905 (b). However, that section also expressly permits the longshoreman to maintain a negligence action against the vessel. The report of the House Committee on Education and Labor explained:

> "The committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in nonmaritime pursuits are liable for damages when, through their fault, a worker is injured." H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. . . . (1982), U.S. Code Cong. & Admin. News, p. 4702.

That report also states:

> "The Committee believes that especially with the vast improvement in compensation benefits which the bill

would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like." H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. ..... (1972). U.S. Code Cong. & Admin. News, p. 4703.

And:

> "Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." *Id.* at . . . ., U.S. Code Cong. & Admin. News, p. 4705.

A vessel's obligations to a longshoreman, therefore, should basically be the same as those generally imposed on a possessor of land in favor of a business visitor. Since the American Law Institute's Restatement of the Law was designed "to present an orderly statement of the general common law of the United States," that treatise is the best single indicator of the national standard that is to become the Federal law. Restatement of Torts, Object and Character of the Restatement, Vol. 1 at viii (1934).

It should be noted that adoption of the Restatement standard does not relieve a vessel owner of liability simply because a dangerous condition is known to the stevedore. In fact, § 343 A is specifically directed to avoiding such a result. *Gay*, 546 F. 2d at 1211. Further, § 343 A is intended to extend the standard of care into the area that would be covered by the application of the risk defense, leaving to other provisions of the Restatement the question of whether that defense is available. This is shown by comment (f), which explains:

> "There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty

> may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from knowledge or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances."[5]

The standards contained in §§ 343 and 343A are, therefore, consistent with the 1972 amendments as explained by the legislative history.

The fact that the stevedore's negligence does not automatically absolve the vessel owner of all responsibility does

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[5] Illustration 5 to § 343A further demonstrates that this section extends liability to situations that would normally be covered by assumption of the risk. That illustration states:

> "A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forego her employment. A is subject to liability to C."

not mean that the conduct of the stevedore is irrelevant in determining whether an accident was caused by the negligence of the vessel. Stevedores are employed for their expertise in loading and unloading vessels which, due to their exposure to the elements and the varying conditions encountered during a voyage, are almost always less than perfect. In the present case, barge 2730 had covers that were difficult to move. While this condition was not apparent upon mere observation, it necessarily made itself known to anyone who tried to move the covers. Unlike oil spilled on a deck, this was not a condition that could be overlooked or forgotten by men working in the area. Also unlike a slippery deck, covers that are difficult to move are not, in themselves, dangerous. They do not create any risk that must be removed before people can safely work around them. Risk only arises when an unsafe method is employed to move them.

The covers of Barge 2730 were designed to be lifted by the eyes and stacked at the end of the barge if they became difficult to roll (393a). Wheeling-Pittsburgh had previously used this safe method when it had encountered a stuck cover (448a). The Court of Appeals held that American was nevertheless liable because it also knew that Wheeling-Pittsburgh had also sometimes used the "double cable" method. (Opinion at 16a.)[6] Thus, liability is imposed upon the vessel owner for not having its sole inspector in the Pittsburgh area hire a crane and craneman to check every barge simply because it knew that if a stuck cover were encountered Wheeling-Pittsburgh *might* use a dangerous method to move it even though a safe

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[6] Although the Court stated that American knew "Wheeling regularly used the double cable method" (Opinion at 16a), neither the record nor the findings of the district court indicates this method was used any more regularly than other methods or that American had any reason to anticipate it would be chosen in this case.

method was available. This liability is virtually indistinguishable from the absolute liability for unseaworthiness which Congress sought to abolish in the 1972 amendments.

It is submitted that, under the land-based negligence standard which Congress stated should apply in longshoremen's actions against a vessel, an owner can not be found liable in a situation like that presented here. This land-based standard has been adopted in the Second, Fourth and Fifth Circuits and should be the standard uniformly applied throughout the country.

Conclusion

For the reasons set forth above a Writ of Certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN W. JORDAN IV,
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Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL CORPORATION, et al.

THOMAS W. GRIFFITH, Appellant in No. 78-2159

WHEELING-PITTSBURGH STEEL CORPORATION, Appellant in No. 78-2160

AMERICAN COMMERCIAL LINES, INC., Appellant in No. 78-2161

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 73-0706)

Argued June 7, 1979

Before GIBBONS, WEIS and HIGGINBOTHAM, *Circuit Judges*

(Opinion filed August 24, 1979)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Thomas W. Griffith, an employee of Wheeling-Pittsburgh Steel Corporation (Wheeling) commenced this action in August 1973 against his employer, and against American Commercial Lines, Inc. (American), the owner of barge No. 2730, pursuant to § 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. 33 U.S.C. § 905(b). He sought damages for injuries sustained on May 26, 1973 when he fell into the hold of barge No. 2730. Both defendants denied liability to Griffith, and each cross-claimed against the other for indemnification and contribution. Both also moved for summary judgment against Griffith and against each other on their respective cross-claims. The district court granted Wheeling's motion for partial summary judgment, dismissing Griffith's negligence claim against Wheeling, and barring any claim for contribution or indemnity by American against Wheel-

ing.[1] The order granting partial summary judgment was entered as a final judgment, and this court then considered appeals by Griffith and American from that order. We reversed and remanded for further proceedings consistent with our opinion.[2]

Following a non-jury trial the district court held both Wheeling and American liable to Griffith on a negligence theory. It further found that Griffith had suffered compensatory damages in the amount of $209,299.45, but reduced his recovery by 25% because it found that 25% of those damages was attributable to Wheeling's negligence in a stevedoring capacity. On June 15, 1978, the court entered judgment against American for $104,649.73 (50% of Griffith's damages) and against Wheeling for $52,324.87 (25% of those damages) a total of $156,974.60.[3] All parties appeal from this final judgment. Once again we must remand for further proceedings.

I. Facts

The facts respecting Griffith's employment in the Wheeling common labor pool at Allenport, Pennsylvania, his assignment on the day of the accident to work with a barge crew at the river landing, and the happening of the accident are detailed in our previous opinion. That appeal reviewed the summary judgment record. The trial court's findings of fact after the trial confirm that statement in all material respects, and we repeat it here.

> Appellee Wheeling-Pittsburgh Steel Corporation (Wheeling) operates a steel mill along the banks of the Monongahela River at Allenport, Pennsylvania.

1. Griffith v. Wheeling Pittsburgh Steel Corp., 384 F. Supp. 230 (W.D. Pa. 1974).

2. Griffith v. Wheeling Pittsburgh Steel Corporation, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (*Griffith I*). The *Griffith I* court affirmed the district court's holding that Griffith was not a Jones Act seaman, and therefore had no Jones Act remedy against either defendant. 521 F.2d at 36-38.

3. Griffith v. Wheeling-Pittsburgh Steel Corp., 452 F. Supp. 841 (W.D. Pa. 1978).

It first employed appellant Thomas Griffith on February 11, 1973, about four months before the date of the injury that was to become the subject of this action. He worked out of a common labor pool in the construction department and was assigned on a daily basis to a variety of landbased jobs. On April 1, 1973 Griffith bid into the hot mill labor pool, where as before he was assigned to various jobs on a daily basis. As part of this pool he was assigned to work at the company's barge landing on the river for a total of 3¾ days including the date of the accident on May 26, 1973.

On that day, plaintiff was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant-appellant American Commercial Lines, Inc. (American). Three days earlier, on May 23, it had been delivered to Wheeling and was incorporated into the latter's "coal fleet" to await future use. On May 25, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

On the morning of the day of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known as "rounding" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole as-

sistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 p.m. Allfree directed the crew to stop loading the barge and to close the covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had difficulty closing one of the covers. A cable was attached from the crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

521 F.2d at 34-35.

II. Griffith's Appeal

Griffith's appeal contests the reduction of his recovery to $156,974.60. Griffith's § 905(b) claims were against the barge owner, American, on the theory that it had negligently furnished Wheeling a defective barge, and against Wheeling as owner *pro hac vice* for negligently directing him to work on that unsafe barge. As noted, the trial court found in Griffith's favor on both of these claims. Both Wheeling and American contest liability to Griffith, and their contentions are addressed in Parts III and IV below. But neither contests the district court's finding of fact that

Griffith suffered $209,299.45 in compensatory damages. Nor does either contend that Griffith, himself, was guilty of any negligence which contributed to the accident. In this Part we address the reduction of Griffith's damages on the assumption that the trial court's liability determinations in Griffith's favor are correct.

The court found that American was negligent in delivering a barge with defective cover mechanisms, knowing that workers such as Griffith would be exposed to risk of injury for those defects. It found that Wheeling, in its capacity as owner *pro hac vice* of the barge, was negligent in failing to give adequate instructions to steelworkers unfamiliar with river work, in providing a defective barge for such work, and in failing to inspect, repair, or reject the defective barge. It also found that in its stevedoring capacity, as distinguished from its capacity as owner *pro hac vice,* Wheeling was liable for the negligence of its employees, Griffith's fellow servants. The court allocated the responsibility for Griffith's injuries 50% to American, 25% to Wheeling as owner *pro hac vice,* and 25% to Wheeling as stevedore. It then applied what has become known as the equitable credit doctrine to reduce Griffith's total recovery by 25%, representing the negligence attributable to his employer, Wheeling, acting in its capacity as stevedore.

In adopting the equitable credit doctrine the trial court decided the question which this court expressly reserved in *Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 147 (3d Cir. 1977). The theory behind that doctrine was that when Congress in the 1972 Amendments to the LHWCA eliminated the shipowner's strict liability to longshoremen for unseaworthiness, and at the same time created in § 905(b) a new negligence cause of action against the shipowner, it did not intend to impose liability upon the shipowner for that part of the longshoreman's damages attributable to the negligence of the longshoreman's employer. The workman's compensation remedy was said to cover that percentage of the damages. This statutory compensation

was characterized as equitable in recognition of the fact that under § 933(c) of the Act the stevedore employer had a lien on the employee's third party recovery. Thus, in the absence of a credit principle, the stevedore might in some cases be fully repaid for its workmen's compensation payments by the shipowner, although its own employees were significantly responsible for the injury. The shipowner would then be left to bear the burden of the longshoreman's damage recovery, despite its lesser responsibility. It was thought to be equitable to prevent this result by reducing the longshoreman's negligence recovery in proportion to the percentage of the stevedore's negligence.

In *Edmonds v. Compagnie Generale Transatlantique*, 47 U.S.L.W. 4868 (U.S. June 27, 1979), the Supreme Court reversed an *en banc* decision of the Fourth Circuit [4] which had applied the equitable credit doctrine to reduce a negligence recovery in a § 905(b) action against a shipowner by a percentage equal to the proportionate fault of the longshoreman's employer. The Court held that Congress did not intend to modify the longshoreman's pre-existing right to recover for his injuries in full against a negligent shipowner, even in cases where the negligence of the stevedore contributed to the injury. Whatever the conduct of the longshoreman's employer, a negligent shipowner is liable for the full amount of the longshoreman's damages. Justice White for the Court recognized that by virtue of the stevedore employer's compensation lien on the employee's third party recovery the *Edmonds* result may relieve a negligent stevedore even of the burden of statutory compensation payments, 47 U.S.L.W. at 4871, but found that circumstance was not decisive. So much for equitable credit.

Thus unless both Wheeling and American can prevail in their appeal on liability issues, a judgment must be entered in favor of Griffith against one or both in the full amount of $209,299.45.

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4. Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153, 1155-56 (4th Cir. 1978) (*en banc*).

III. American's Appeal Against Griffith

The district court held that American, as owner, had breached its duty to exercise reasonable care by delivering barge No. 2730 to Wheeling with its cover mechanisms rusted, bent, and unlubricated, and with the eyelets on the stuck hatch cover completely missing. The court concluded that "[d]elivery of such a barge, with knowledge that many workers would necessarily come into contact with the deteriorated barge covers, was inexcusably negligent." 452 F. Supp. at 845.

In reaching this conclusion, the trial court considered at some length the applicable standard of care. It recognized that some prior cases[5] had relied upon §§ 343-343A of the Restatement (Second) of Torts (1965), dealing with the liability of landowners and occupiers, as defining the standard of care applicable to vessel owners under § 905(b) of the Amendments.[6] It concluded, however, that the application of that formulation would introduce into the maritime torts area distinctions between licensees and invitees which would be inappropriate in the context of commercial shipping. Relying on the Supreme Court's decision in

5. *E.g.*, Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364 (2d Cir. 1978); Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233 (5th Cir. 1977); Anuszewski v. Dynamic Mariners Corporation, Panama, 540 F.2d 757, 759 (4th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1098 (1977).

6. Those sections read as follows:

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), the court discerned an emerging trend in the law toward imposing upon property owners a more general "duty to exercise reasonable care under all the circumstances of the case." 441 F. Supp. at 844. The court also observed that in most cases, including the case *sub judice*, the same result would be reached whether one applied the Restatement § 343 formulation or the more universal duty to exercise reasonable care under all the circumstances. The court therefore concluded that the latter standard was the proper one to apply.

On appeal, American urges that the standard adopted by the district court "leads to an improper imposition of liability in this case and provides no real guidance for the decision of future cases." We are less concerned with the latter objection than with the former, and we conclude that the facts found by the trial court justify imposition of liability on the vessel owner in this case.

A brief review of this court's prior decisions discussing the standard of care under § 905(b) will serve as background for our review of the district court's decision. In *Griffith I*, *supra*, we pointed out, first, that the clear intent of amended § 905(b) was to relieve vessel owners of absolute liability for injuries to stevedores, whether that liability was imposed on the basis of unseaworthiness or on a *respondeat superior* theory. 521 F.2d at 40. At the same time, we recognized the apparent intention of Congress "to apply land-based common law negligence principles on a uniform national basis" in actions against the vessel owner under § 905(b). *Id.* at 44 & n.21. We did not at that time undertake to specify the principles to be applied to the record on remand.

This court's subsequent decisions have concentrated upon clarifying the implications of Congress' rejection in § 905(b) of strict or *respondeat superior* liability as a basis for recovery against the vessel owner. In *Brown v. Ivaran Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), *cert. denied*,

430 U.S. 969 (1977), we concluded that § 416 of the Restatement (Second) of Torts, which imposes a non-delegable duty of due care upon persons employing a contractor to perform work "dangerous in [the] absence of special precautions" was inconsistent with the intent of Congress to eliminate shipowner liability without fault. Similarly, in *Marant v. Farrell Lines, Inc., supra*, we reversed a judgment for the longshoreman, because the jury had been instructed that "responsibility for the safety of the longshoreman lies concurrently or jointly" with the stevedore and the shipowner. Relying on *Brown*, we held that "the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." 550 F.2d at 144 (quoting *Brown, supra*, 545 F.2d at 860). And in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977), we held that §§ 318 and 416-429 of the Second Restatement were inapplicable in a § 905(b) action, again on the basis that each would have resulted in the imposition upon the shipowner of liability without fault. We held that § 414 of the Restatement, which permits imposition of liability upon a principal who retains control over some part the work performed by an independent contractor, and who fails to exercise that control with reasonable care, might provide a proper basis for liability under § 905(b), but concluded that the plaintiff had failed to introduce sufficient evidence of the shipowner's control over the stevedore's operation to support a recovery. 554 F.2d at 1252.

Rich v. United States Lines, 596 F.2d 541 (3d Cir. 1979), relied on by American at oral argument, continues the pattern of our earlier decisions. In *Rich* the plaintiff longshoreman was injured when he slipped on sheet ice which had accumulated on top of containers stacked on board the defendant's vessel. The panel first held that plaintiff's evidence was insufficient as a matter of law to support liability under § 414 of the Restatement. *Id.* at 550. The plaintiff, relying upon the legislative history of the Amendments, also argued that the shipowner had

breached its duty to provide a "safe place to work" by failing to take appropriate corrective action, despite its knowledge of the dangerous ice conditions. In a discussion closely tailored to the facts of the case, the panel majority rejected this contention on the ground that the plaintiff had failed to establish that the ice covered containers were a part of the ship for whose condition the shipowner was customarily responsible. In the panel's view, the evidence in the case showed "*beyond a doubt*" that the stevedoring company, rather than the vessel, was "*in complete charge* of the details of the handling of the containers." *Id.* at 557. (emphasis added). To impose liability on those facts, the court concluded, would "amount once again to the establishment of a non-delegable duty." *Id.* at 556 (citing *Hurst v. Triad Shipping, supra*, 554 F.2d at 1251). The panel majority's view of the case made it unnecessary for them to consider the standard of care issue.

> These decisions firmly establish that under § 905(b):
>
> The vessel has no general duty continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions).

Rich v. United States Lines, Inc., supra, 596 F.2d at 560 (Garth, J., concurring) (footnote omitted). They do not, however, speak directly to the scope of the vessel's independent duty under § 905(b) to "exercise the same care as a land based person in providing a safe place to work."[7]

American presents two arguments against the standard of reasonable care under all the circumstances applied by the district court. First, it argues that a vessel should

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7. H.R. Rep. No. 92-441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Admin. News 4698, 4704 [hereinafter cited as *House Report*].

not be held liable in negligence under § 905(b) if it has delivered the ship "in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter" will be able to load or unload the vessel safely by exercising "ordinary care under the circumstances."[8] Alternatively, American urges this court to adopt the standard of care established in Restatement (Second) §§ 343-343A to govern all actions under § 905(b).

We reject both suggestions. Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an "expert and experienced" fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds v. Compagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule barring all recovery against a negligent shipowner on the basis of imputed employer negligence. We do not hold that the likelihood of negligent conduct on the part of the stevedoring contractor is always irrelevant in determining whether the vessel has breached its duty of due care. *Compare* Restatement (Second) of Torts § 302A[9] with *id.* § 302. But

8. American Brief at 14 (quoting *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom., Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960).

9. Section 302A reads:

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

the fact that the stevedore has been negligent cannot be automatically decisive of that question.

Similarly, we cannot agree that §§ 343 and 343A of the Second Restatement define for all cases the appropriate standard of care under § 905(b). It is true, as American points out, that we have approved reference to the Restatement (Second) in § 905(b) negligence actions "as the national expression of non-maritime tort principles." *Hurst v. Triad Shipping Co., supra,* 554 F.2d at 1248; *Brown v. Ivarans Rederi A/S, supra,* 545 F.2d at 863. But as *Hurst* itself illustrates, those provisions are adopted only when they are consistent with Congressional intent in enacting § 905(b). Sections 343 and 343A do not meet that standard. Both sections would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. *See* § 343A, Comment e. As we stated in *Hurst,* 554 F.2d at 1250, *Brown,* 545 F.2d at 863-64 n.10, and *Rich,* 596 F.2d at 551 n.21, that principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk in cases decided under § 905(b).[10]

More fundamentally, we think that it would be unwise to assume that the principles of negligence law applicable to owners of land will in all cases provide an appropriate "land based" standard of care for actions against a vessel owner. In some cases the analogy will be appropriate. In other cases, different portions of the Restatement, including, for example, the duty of care owed by a supplier of a chattel in commerce, may provide a more appropriate standard of reference. *Compare* Restatement (Second) of Torts §§ 388-389. Indeed, it might persuasively be argued that it was the latter duty which was breached in this case. Moreover, we agree with the district court that insofar as

10. *See House Report, supra* n.7, [1972] U.S. Code Cong. & Admin. News.

the standards of liability in § 343 and 343A are colored by traditional economic and social attitudes uniquely associated with land ownership, wholesale importation of those sections into § 905(b) might be confusing and counterproductive. *See Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959); *Santos v. Scindia Steam Navigation Co.,* 598 F.2d 480, 486-88 (9th Cir. 1979); *Gallardo v. Westfal-Larsen & Co. A/S,* 435 F. Supp. 484, 493-95 (N.D. Cal. 1977); *Espinoza v. United States Lines, Inc.,* 444 F. Supp. 405, 409-12 (S.D. N.Y.), *aff'd,* 586 F.2d 832 (2d Cir. 1978); G. Gilmore & C. Black, The Law of Admiralty 453-54 (2d ed. 1975).

The sounder approach, we think, is to recognize that § 905(b) imposes on vessel owners the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business. *Accord, Santos v. Scindia Steam Navigation Co., supra,* 598 F.2d at 485-88; *Gallardo v. Westfal Larsen & Co. A/S, supra,* 435 F. Supp. at 496. *See Kermarec v. Compagnie Generale Transatlantique, supra,* 358 U.S. at 632; *Brown v. Ivarans Rederi A/S, supra,* 545 F.2d at 863. *Cf.* Restatement (Second) of Torts §§ 281-83, 302A, 305, 452. Proceeding from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.

At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen

against that danger. *See Santos v. Scindia Steam Navigation Co., supra,* 598 F.2d at 485.[11]

Reviewing the record in this case, we think that the district court's application of the standard of reasonable care under all the circumstances of this case touched all of these bases. Certainly, there was ample evidence to support the court's conclusion that American knew or should have known of the rusted, decrepit condition of the covers on barge 2730, and that American failed to exercise reasonable care to correct that condition. American does not argue otherwise. Rather the substance of American's argument is that the evidence was insufficient to show that it knew or should have known that the condition of the barge posed an unreasonable risk of harm to longshoremen in Griffith's position. Specifically American contends that the difficulty with the stuck covers was obvious and could have been solved without danger to anyone, and that therefore American should not have been required to anticipate that Wheeling would attempt to overcome the defect in the covers by the unsafe method to which it resorted.

In pressing this argument American attacks both the factual and legal findings of the court below. American points factual and legal findings of the court below. American points to the district court's reference to missing eyelets to which the hook which Griffith was holding could have been attached, and argues that that finding is clearly erroneous. In fact, the record shows that there were two eyelets on the covers, one close to each side of the barge (Exhibit D2). But the uncontradicted trial testimony was that Wheeling's employees had tried ten or twenty times without success to unstick the barge covers by attaching cables to those eyelets. (224a-225a; 313a-314a). The missing eyelets to which the court referred would have been at the center of the covers, where they could have been grasped in a balanced manner by the crane cables. Because such eyelets were missing or had never been installed,

11. *Compare* Restatement (Second) of Torts, §§ 343(a)-(c); *Id.* §§ 388(a) and (c).

Wheeling's employees had to remain on the cover, holding the cable hooks under the rim of the cover, while tension was applied.

American also argues that there were alternative methods available to Wheeling-Pittsburgh by which the covers might have been moved safely, which it was entitled to assume that Wheeling would rely upon. One safe alternative method which American suggests is the use of the outboard eyelets on the covers, a method which the testimony discloses was tried and which, due to the defective condition of the barge, proved ineffective. William Toutant, the designer of barge No. 2730, also testified that with the use of a four part sling the covers, which weigh over nine thousand pounds, could have been lifted off safely. (393-a). But Frank Merritt, an American employee, was aware, before barge No. 2730 was furnished to Wheeling, that at Allenport Wheeling regularly used the double cable method of moving stuck barge covers. (41a). Thus when American furnished barge No. 2730 it knew or should have known that the combination of the unlubricated, rusty and bent track mechanism and the missing center eyelets would expose Wheeling's longshoremen to the precise sort of risk to which Griffith was exposed. The fact that Wheeling's chosen method of operation may have been negligent is therefore of no help to American.[12]

The record before the district judge contained substantial evidence that American knew of the condition on board its vessel; that it knew or should have known that that condition posed an unreasonable risk to workers in Griffith's position; and that it failed to correct that condition. On this record, then, we hold that the district court's findings of fact with respect to American's liability to Griffith are not clearly erroneous, and that its application of a general standard of reasonable care in the circumstances was not legal error.

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12. *See* Restatement (Second) of Torts § 302 *quoted supra* at n.9.

IV. WHEELING'S APPEAL AGAINST GRIFFITH

Wheeling does not contest that, if it was properly held to be an owner *pro hac vice,* it was guilty of negligence in that capacity. But it contends that the judgment against it in favor of Griffith must be reversed because as a matter of law it is not an owner *pro hac vice.* An appreciation of that argument requires an examination of the complex procedural history of this case. As we indicated above, the trial court in 1974 granted Wheeling's motion for summary judgment against Griffith. In doing so it accepted Wheeling's argument that even assuming its alleged status as an owner *pro hac vice,* the LHWCA precluded liability against it in favor of an employee. 384 F. Supp. at 237. Since that legal theory rendered its ownership status immaterial, Wheeling argues, it did not file affidavits contesting that status in support of its motion for summary judgment. On appeal this court, accepting as undisputed Wheeling's exclusive though temporary control of barge No. 2730, rejected its legal position that the LHWCA barred recovery against it as an owner *pro hac vice.* As we explained: "Wheeling concedes that it might be found to be an 'owner pro hac vice' as that term has been applied in this circuit." 521 F.2d at 39-40 (footnote omitted). Thus, our reversal of summary judgment in Wheeling's favor established no more than that based on the pleadings, affidavits, and discovery materials then on file, a factfinder could find Wheeling to be a *pro hac vice* owner within the meaning of *Blair v. United States Steel Corp.,* 444 F.2d 1390 (3d Cir. 1971) (per curiam), *cert. denied,* 404 U.S. 1018 (1972).

Wheeling now points out that there is substantial additional evidence in the record concerning its relationship to barge No. 2730 which was not of record at the time of the summary judgment. That evidence, it contends, establishes that it was not a *pro hac vice* owner as defined in *Blair.* It contends, moreover, that the trial court, in misplaced reliance on the law of the case doctrine, disregarded

that additional evidence in holding it liable. Finally, it contends that even if the *Blair* standard as to *pro hac vice* ownership has been met, that case should be overruled.

When the case was first before us it was undisputed, and still is after trial, that barge No. 2730 was delivered to Wheeling's Allenport landing by a river boat company, and incorporated into a fleet there under the supervision of Joseph Allfree, Wheeling's river dock foreman. From the time Wheeling received the barge until the time of the accident it had exclusive possession. All movements of the barge while it was in Wheeling's possession were the responsibility of Wheeling's employee rivermen. Their duties included placing lights on the barges moored with Wheeling's fleet and moving them about the landing to facilitate loading. Barge No. 2730 was one of a number furnished to Wheeling for transportation of its products, and it was free to chose which among them it would use. These undisputed facts fit squarely with the *Blair* holding. Wheeling does not contend that any available evidence bearing on its relationship to barge No. 2730 was excluded at trial. Rather, it points to additional evidence introduced at trial, as follows:

> [Wheeling] could load only material destined for a pre-determined port (350a); the charter between [Wheeling] and American was oral rather than written (7a, 337a, 566a); Barge 2730 could have been removed by American for repairs without [Wheeling's] prior permission (355a-356a); [Wheeling] was not responsible for rent on American barges which were unavailable due to repair (358a); [Wheeling] paid American for Barge 2730 according to tonnage shipped rather than type of barge used (449a, 564a); [Wheeling] had nothing to do with the route or time which Barge 2730 took to arrive at its final destination (565a, 349a); and [Wheeling] could not move Barge 2730 from its landing without [American's] consent and without the assessment of an additional fee. (354a, 358a) (ICC Waterways Freight Tariff, 8-B, Items 420-435)

Wheeling's Brief in No. 76-2160 at 12. Wheeling argues that because the trial court relied on the law of the case doctrine it disregarded this trial evidence. Because the record is not clear on this issue, we must remand for further factual findings.

The trial court found after trial that:

> The status of [Wheeling] as owner *pro hac vice* at the time of the injury is well established under ***both*** the law of the case ***and*** the applicable case law.

452 F. Supp. at 845 (emphasis supplied). Since evidence on the issue of Wheeling's relationship to barge No. 2730 was received, and the court nowhere denied considering it, the quoted language could be understood as a finding upon all the evidence presented, that Wheeling fell within the definition of *pro hac vice* owner announced in *Blair* and in *Griffith I*. On the other hand, it may be read as relying solely on the holding in *Griffith I* to determine the issue of ownership status. There are a number of indications in the record that the district judge may well have erroneously viewed our decision in *Griffith I* as foreclosing any factual inquiry into Wheeling's ownership status on remand. *See* 340a; 341a; 342a. Because we are unable to determine from the record whether the district judge actually considered the further evidence bearing on ownership status submitted by Wheeling, and because Wheeling was entitled to have the district judge pass on that evidence before he determined its ownership status, a remand is required for further findings of fact on that issue.

We reject, however, Wheeling's further contention that *Blair* and *Griffith I* should be overruled. In the first place that would require action by the court in banc. Nor is this panel persuaded that the *Blair* holding should be reconsidered.[13] Wheeling argues that that holding imposes an

13. Judge Weis believes that *Blair* should not be extended but should be limited to its facts, and that the burden of establishing a demise charter rests upon the owner of the vessel. *See Guzman v. Pirchirilo*, 369 U.S. 698 (1962); *Leary v. United States*, 81 U.S. 607, 612 (1871); *Dobbins v. Crane*, 567 F.2d 559 (3d Cir. 1977); *Fitzgerald v. A. L. Burbank*, 451 F.2d 670, 676 (2d Cir. 1971); *Miller v. Union Barge Line Corp.*, 299 F. Supp. 718 (W.D. Pa. 1969).

inconvenience upon barge users who operate their own landings and perform their own stevedoring. That may be, but such barge customers also undoubtedly obtain substantial cost and convenience advantages from doing so. If the barges remained in the possession and control of an owner's crew, that crew would supervise use of the barge at the landing and might possibly guard against injuries to longshoreman invitees. But the bargeline customer would be charged accordingly. When that customer chooses to take exclusive possession and control of a barge in navigation, even for a limited time and in a limited space, it should, as we have held, be obliged to discharge the responsibilities of an owner. Another experienced admiralty court agrees. *See Eskine v. United Barge Co.*, 484 F.2d 1194 (5th Cir. 1973).

Wheeling also contends that the trial court erred in finding that it was negligent, in its capacity as owner *pro hac vice*, in failing adequately to train steelworkers unfamiliar with river work. That contention bears upon the allocation of liability between Wheeling and American. It does not, however, affect Wheeling's liability to Griffith, since findings that Wheeling was negligent as owner *pro hac vice* in providing a defective barge, and in failing to inspect, repair or reject it, are not challenged as factually or legally erroneous.

Thus we hold that the judgment of liability in favor of Griffith against Wheeling as owner *pro hac vice* must be vacated and remanded for further findings regarding Wheeling's status as owner.

V. Wheeling's Appeal Against American

A. Indemnification

Wheeling also appeals from the district court's rejection of its claim against American for indemnification. While a factual finding in the district court that Wheeling was not an owner *pro hac vice* would moot this claim, we think that in light of the possibility that the issue of con-

tribution or indemnity is not foreclosed by our remand, resolution of this question is proper on this record.

Wheeling contends that when a demise charterer—an owner *pro hac vice*—and an owner are both found to be negligent with respect to any injury-causing defect, the negligence of the owner in supplying the defective barge is active or primary, while that of the owner *pro hac vice*, in failing to discover and remedy the defect is passive or secondary. A tortfeasor who is only secondarily or passively negligent, it urges, is entitled to indemnification for any loss occasioned by the primary or active negligence of another. It points out that such a non-contractual duty by a primary or active tortfeasor to indemnify a secondary or passive tortfeasor has been recognized both by Pennsylvania law, *e.g., Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951); *Tromza v. Tecumseh Products Co.*, 378 F.2d 601 (3d Cir. 1967), and in maritime cases. *E.g., Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969); *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F.2d 182 (2d Cir. 1929).

We reject at the outset Wheeling's suggestion that rights of indemnity and contribution between maritime joint tortfeasors should be governed by state law. Consistent with the intent of Congress in enacting the 1972 Amendments, we think that whatever rule is adopted should be uniform and federal. *Brown v. Ivarans Rederi A/S, supra*, 545 F.2d at 861-63; *Griffith I, supra*, 521 F.2d at 44 & n.21. Moreover, while we recognize that the federal cases cited by Wheeling might once have had some force, we think that the law of maritime indemnity has been substantially altered by the Supreme Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). In that case the Court abandoned the traditional rule of "divided damages" for maritime collision cases. That rule required "the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their

fault may have been." 421 U.S. at 397. In the future, the Court held, collision damages should be apportioned on a comparative fault basis. The rationale behind that decision was simple: allocation of liability directly in proportion to fault was a much fairer method of determining damages than the rough and ready 50-50 division imposed by the traditional rule.

The rule of non-contractual indemnity pressed by Wheeling, like the contribution rule at issue in *Reliable Transfer*, is designed to shift the primary burden of reparations to the party more at fault, thereby avoiding unjust, or at least unsatisfactory results. But the rule performs that task by relieving a concededly negligent tortfeasor—albeit his negligence was "passive"—from *any* liability for the damage that occurred. That result seems strongly at odds with the preference for comparative fault expressed in *Reliable Transfer*. A similar rule, formerly applied in maritime collision cases, held that when one ship's negligence was "major," and the other's "minor," the grossly negligent party could be held solely at fault. *E.g., The City of New York*, 147 U.S. 72, 85 (1893). The *Reliable Transfer* Court dismissed this rule as "inherently unreliable" and unfair. "That a vessel is primarily negligent does not justify it shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." 421 U.S. at 406. Similarly, we can see no good reason why in this non-collision maritime context the fact that Wheeling's conceded negligence as owner *pro hac vice* may have been less egregious than that of American should justify the creation of a right of indemnity which would impose sole responsibility for the accident on American, while allowing Wheeling to go scot-free. In *Griffith I*, *supra*, we suggested that the preferable approach would be to apply the comparative fault principles endorsed in *Reliable Transfer* to achieve an equitable appointment of liability between the two alleged joint tortfeasors. The district court applied those principles here, and we affirm that application.

Thus we hold that the district court properly rejected Wheeling's claim that it should be fully indemnified by American for its liability to Griffith.

B. *Percentage of Negligence*

The trial court, as we noted above, entered judgment against Wheeling for $52,324.87 and against American for $104,649.73, because it held that Wheeling as owner *pro hac vice* was responsible for 25%, and American for 50% of the total damages of $209,299.45. In Part I we held that it was improper to diminish Griffith's recovery by a percentage equal to Wheeling's stevedore negligence. If the court determines on remand that Wheeling is an owner *pro hac vice*, the defendants are jointly and severally liable under § 905(b) for the full amount of Griffith's damages. That holding would require a redetermination of the amount for which each defendant is liable. According to the district court, negligence actionable under § 905(b) produced 75% of the damages, of which 50% was attributable to American and 25% to Wheeling. The court's findings suggest that on remand contribution in the ratio of two thirds-one third would be appropriate. Thus, if the findings upon which the 50%-25% allocation was based were sustainable it would be a simple matter to calculate the contribution of each defendant toward the $209,299.45 joint liability.

Unfortunately, however, we are not in a position to make that simple calculation. As we noted above, the trial court predicated its finding of negligence by Wheeling as owner *pro hac vice* in part on Wheeling's "[f]ailure to give adequate safety instructions to steelworkers unfamiliar with river work." 452 F.2d at 845. Wheeling notes that there is a serious problem of proximate cause with respect to that finding, since in the same accident which injured the untrained Griffith, his supervisor, Joseph Armstrong, a well-trained and experienced riverman, was also injured. More fundamentally, Wheeling observes, and we

agree, that on this record, its failure to train Griffith and his fellow servants was, insofar as it contributed to his injuries, a failure to train them in longshoreman skills. That failure must as a matter of law be attributed to Wheeling in its capacity as a stevedore rather than as an owner *pro hac vice*. "The only negligence of [Wheeling] which could properly be . . . attributed to Wheeling [as owner *pro hac vice*] was its negligence in failing to inspect, reject, or correct [b]arge 2730." Appellant's Brief in No. 78-2160 at 25. Since the trial court did not disclose to what extent its finding of 25% culpability was attributable to Wheeling's failure to train, we cannot recalculate the allocation between Wheeling and American for purposes of contribution. A remand is necessary so that the trial court can make that determination, excluding from the calculation Wheeling's negligence in failing to train.

VI. American's Appeal Against Wheeling

American objects to the allocation of liability between it as owner and Wheeling as owner *pro hac vice* on the basis of 50%-25%. It urges that since the duties of an owner and an owner *pro hac vice* are the same, their liabilities should be the same unless some special circumstance alters the balance. We readily grant that the duties to third parties of an owner and an owner *pro hac vice* are the same, with respect to the condition of the vessel. Both are required to exercise reasonable care under all the circumstances of the case. But it does not follow that because their duties are the same and each breached those duties in some manner their liability *inter sese* for a joint tort should be the same. What we have said in Part V-A. above about the applicability of the principles of *Reliable Transfer* is equally applicable here. When two acts of negligence concur in causing injury, contribution should be allocated on a comparative fault basis. The trial court heard the testimony and made a factual determination as to comparative fault which, except to the extent discussed in Parts IV and V-B. above, we cannot find clearly errone-

ous. Our decision in Part V-B. above requires a redetermination of the percentage of contribution, excluding one of the factors on which the trial court relied.

Conclusion

The judgment appealed from will be modified so as to provide that American as owner is jointly liable to Griffith for $209,299.45. The judgment will be vacated, insofar as it determines that Wheeling was liable as an owner *pro hac vice*, and the case remanded for a redetermination, on all the evidence presented, of Wheeling's ownership status. If Wheeling is held to be an owner *pro hac vice*, then the court should redetermine the liability of each defendant consistent with Part V-B. of this opinion. Costs shall be taxed in favor of Griffith against American, but Wheeling and American shall between themselves each bear their own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL CORPORATION, et al.
THOMAS F. GRIFFITH, *Appellant* in No. 78-2159
WHEELING-PITTSBURGH STEEL CORPORATION, *Appellant* in No. 78-2160
AMERICAN COMMERCIAL LINES, INC. *Appellant* in No. 78-2161

(D.C. Civil No. 73-0706)

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above matter filed August 24, 1979, be and is hereby amended as follows:

Page 15, Second Paragraph, second, third and fourth line now reads:

> factual and legal findings of the court below. American points factual and legal findings of the court below. American points to the district court's reference to missing. . . .

The underscored sentence should be deleted and it should now read:

> factual and legal findings of the court below. American points to the district court's reference to missing. . . .

By the Court,

JOHN J. GIBBONS
Circuit Judge

Dated: October 3, 1979

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.) 55

APPENDIX B

Memorandum Opinion and Order

RECEIVED
JUN 16 1978
THOMSON, RHODES & GRIGSBY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS W. GRIFFITH,

Plaintiff,

v.

WHEELING-PITTSBURGH STEEL CORPORATION
and AMERICAN COMMERCIAL LINES, INC.,

Defendants.

Civil Action No. 73-706

This is an action for damages brought by Thomas W. Griffith pursuant to the *Longshoremen's and Harbor Worker's Compensation Act,* 35 U.S.C. § 901 *et seq.* arising out of a May 26, 1973 accident.[1] Jurisdiction is conferred on this Court by 28 U.S.C. § 1357(3).

---

[1] The pertinent provision of the Longshoremen's and Harbor Worker's Compensation Act is Section 905(b) which states: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and

(Footnote continued on following page)

On February 11, 1973, Griffith began his employment with the Wheeling-Pittsburgh Company at its Allenport, Pennsylvania plant. Griffith began work in the common labor pool of the construction department. The nature of his work was such that he would report to the pool each morning and thereafter report to whatever assignment was available that day. During this period, all of Griffith's duties were performed on land.

On April 1, 1973, Griffith bid into the hot mill labor pool. As was the case with his work previously, while a member of the hot mill labor pool, Griffith had no permanent duties, but rather was assigned to various jobs on a daily basis.

Including the date of the accident as a full day of work, Griffith worked 74 days for Wheeling-Pittsburgh. Of this time, he was temporarily assigned to work at the company's barge landing with longshoreman-type duties for 3 3/4 days. Thus, of Griffith's work while he was employed by Wheeling-Pittsburgh, 94.6% was exclusively upon the land and only 5.4% of the time that he was employed by the company was spent in and about the barge landing at the Allenport plant.

(Footnote continued from preceding page)

any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter."

Of that 5.4% only about one-half of that time was actually spent working on a barge while it was in the water. The rest of the time that he was assigned to the barge landing, Griffith spent working on the railroad cars in the billet yard.

On the date of the accident, Griffith was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant American Commercial Lines, Inc. (American). Three days earlier, on May 23, it had been delivered to Wheeling and was incorporated into the latter's "*coal fleet*" to await future use. On May 25, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

On the morning of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before Noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known as "*rounding*" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole assistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 P.M. Allfree directed the crew to stop loading the barge and to close the covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had difficulty closing one of the covers. A cable was attached from the crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

Griffith filed this action against both his employer Wheeling and the vessel owner American alleging negligence on the part of both. Both defendants have denied liability to Griffith and cross-claimed against each other for indemnification or contribution. A non-jury trial was held on October 25, 1977 through October 28, 1977. Considering all the evidence elicited at trial, the following shall constitute findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a).

LAND-BASED STANDARD OF NEGLIGENCE

There is general agreement that the case *sub judice* should be governed by the applicable land based standard of negligence. *Griffith v. Wheeling-Pittsburgh Steel Corporation,* 521 F.2d 31, 44 (3d Cir. 1975). Far less consensus is available, however, when discussion turns toward the question of what is the appropriate land based standard.

The traditional judicial posture has been to rely upon the *Restatement (Second) of Torts 343A* (1965) for standard of care. As Judge Hunter noted in *Hurst v. Triad Shipping Company,* 554 F.2d 1237, 1248 (3d Cir. 1977):

> ". . . admiralty courts applying amended section 905(b) generally have turned to the Restatement (Second) of Torts as the national expression of non-maritime tort principles."

Representative of such a history of adherence to the Restatement standard has been the Western District Court of Pennsylvania in general, and this Court in particular. *Griffith v. Wheeling-Pittsburgh Steel Corporation,* C.A. No. 73-0706 (March 22, 1977); *Duncan v. Dravo Corp.,* C.A. No. 76-540 (February 9, 1977).

An emerging trend, on the other hand, has favored defining the standard of negligence as imposing a duty to exercise reasonable care under all of the circumstances of the case. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959); *Rowland v. Christian,* 443 P.2d 561 (1968). We take the opportunity afforded by the instant case to reassess whether or not Restatement (Second) Section 343A is a viable national standard of land based negligence.

Restatement (Second), Section 343A provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees."

"The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." Kermarec, supra at 630. In many instances under the Restatement standard, this feudal categorization predetermined substantive consequences rather than being one factor which contributed to an overall evaluation of the alleged breach of duty. A general standard of reasonable care under all the circumstances allows the relationship of the landowner *vis a vis* the plaintiff to be considered to the extent relevant and invested with the weight deemed to be appropriate. Varying standards of due care depending upon the applicable agrarian classification cease to be dispositive of the case, but rather the landowner/plaintiff relationship is one factor among many which is relevant in determining the negligence quotient.

This Court is of the belief that the major advantage to such a uniform standard of negligence would be the forthright articulation of reasons for decision. No longer would it be judicially acceptable to state that because a plaintiff is an invitee the standard of care is inflexibly prescribed. The Court must instead state that the plaintiff/landowner relationship is significant because of specified reasons. Although as a practical matter most cases, such as the case *sub judice,* would reach the same result under either a general

standard of due care or the Restatement (Second) formulation, the decisions in the remaining minority of landowner negligence cases and the quality of jurisprudence in all such cases would be enhanced. Accordingly, the applicable land based standard of negligence applied in the instant case is a duty to exercise reasonable care under all of the circumstances of the case.[2]

LIABILITY OF AMERICAN AND WHEELING-PITTSBURGH

The potential liability of American can be examined straightforwardly by measuring its conduct against the land based negligence scale previously discussed. Liability can attach to Wheeling-Pittsburgh under Section 905(b) if negligent, only if two additional conditions precedent have also been satisfied:

(1) Wheeling-Pittsburgh must have been owner *pro hac vice* of the American Vessel at the time of injury;

(2) Wheeling-Pittsburgh must have been negligent in a non-stevedoring capacity.

The status of Wheeling-Pittsburgh as owner *pro hac vice* at the time of injury is well established under both the law of the case and the applicable case law. 384 F.Supp. at 237, 521 F.2d at 41; *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3rd Cir. 1971).

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[2] For those who might contend that "a general duty of care under the circumstances" standard is too indefinite to be effective, brief mention need only be made of the enduring quality of the "reasonable man" standard.

It is also abundantly clear that Wheeling-Pittsburgh was guilty of non-stevedoring negligence in conjunction with plaintiff's injury in the following particulars: 1) Failure to give adequate safety instructions to steelworkers unfamiliar with river work; 2) Providing a defective barge for stevedore work; 3) Failing to inspect, repair, or reject the defective barge. Both predicates to a finding of liability against Wheeling-Pittsburgh having been established, its conduct also need only be measured against the appropriate negligence standard.

For the reasons which hereafter follow, American, Wheeling-Pittsburgh in its non-stevedoring capacity, and Wheeling-Pittsburgh in its stevedoring capacity, all breached their duty of exercising reasonable care toward the plaintiff.

In view of our factual determination that negligence was both pervasive and flagrant in the case *sub judice*, we will not dwell on the relationship between plaintiff and the defendants as would be appropriate were the conduct of defendants less extreme. Suffice it to say that under the circumstances of this case, both American and Wheeling-Pittsburgh in its dual identity were negligent to such an extent that recovery for plaintiff would be meritorious regardless of the feudal catagorization, except trespasser. Thus, with regard to the facts *sub judice*, even the most restrictive duty would have found itself breached.

American failed to exercise reasonable care under the circumstances as evidenced by the delivery of Barge 2730 to Wheeling-Pittsburgh in a defective condition. Specifically, the barge cover mechanisms were rusted and bent with the eyelets on the stuck cover completely missing. Delivery of

such a barge, with knowledge that many workers would necessarily come into contact with the deteriorated barge covers, was inexcusably negligent.[3]

Wheeling-Pittsburgh, as previously noted, was negligent in its non-stevedoring capacity by failing to require the obviously defective barge to be repaired or rejected and by failing to adequately instruct inexperienced river workers, such as plaintiff, on safety rules and proper work procedures. Stevedoring is to engage in the loading or unloading of vessels. It is apparent that Wheeling-Pittsburgh's disregard of its duty to provide a safe work environment for plaintiff was separate from its considerable additional negligence in the actual conduct of stevedoring operations.

In its stevedoring capacity Wheeling-Pittsburgh was negligent in attempting to close the barge covers through use of a crane even though eyelets on the barge covers were missing. An operation under the supervision of experienced rivermen should also have shown better sense than to enlist the aid of a novice in the questionable closing procedure. The prudent solution for Wheeling-Pittsburgh would have been to pursue repair of the barge. The fact that repair at the time of plaintiff's injury may have disrupted "business as usual" is no justification for the blind pursuit of an expedient, but hazardous course of action.

With due consideration for all the evidence and circumstances of the case *sub judice,* this Court holds that

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[3] This Court finds American's argument that there was no unreasonable risk of harm created by the defective barge because experienced rivermen were capable of working safely to be singularly unappealing. Experienced rivermen supervised the operation in question and yet the accident still occurred.

American, Wheeling-Pittsburgh in its non-stevedoring capacity, and Wheeling-Pittsburgh in its stevedoring capacity were concurrently negligent in causing plaintiff's injuries.

DAMAGES

Damages sustained by Griffith as a proximate result of defendants' negligence are quite extensive. When the accident occurred, plaintiff landed at the bottom of the barge's hold on his right leg, then toppled onto his left leg. He fell on his right wrist and over onto his back. Medical testimony of record substantiates plaintiff's claim for past and future medical expenses in the amount of $11,672.65.

A second component of plaintiff's damages is past and future wage loss. Plaintiff's wage losses are calculated at a rate of $800.00 per month, the amount which plaintiff was earning in 1973 for Wheeling-Pittsburgh. This Court finds total past wages and future lost wages, reduced to present worth at 6%, supported by evidence of record, to be $42,626.80.

The total figure of $54,299.45 for medical expenses and lost earnings is largely uncontested as to reasonableness. Rather, defendants have chosen to marshal their forces in opposition to liability and the following two additional areas of claimed compensable damages.

The first area is plaintiff's claim for impairment of earning capacity. Defendants are required to compensate plaintiff for any lessened ability to earn money in the future as a result of the injuries sustained. It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole

span of life must be considered. It must be determined whether or not the economic horizon of the plaintiff has been shortened because of the injuries sustained as a result of defendants' negligence.

Evidence of record indicates that plaintiff will never again be able to perform work requiring heavy labor. He is also unable to pursue any occupation which would require standing for long periods of time or extensive movement such as walking. Thus, although Griffith can still perform effectively in many useful careers such as teaching, there are also many tasks which plaintiff is permanently foreclosed from pursuing.[4] Bearing in mind that plaintiff's life expectancy is approximately 41 years, this Court believes that the sum of $80,000 adequately and fully compensates him for the considerable reduction in future employment opportunities caused by his severely restricted mobility and dexterity.

Lastly, plaintiff seeks to recover damages for past and future pain, suffering and inconvenience. Following the accident, Griffith suffered from severe pain in the right leg, back, wrist and heel. When he left the hospital, plaintiff had long casts on both legs and his right arm, and was completely bedfast. From May, 1973, to September, 1973, Griffith was confined completely to a stretcher, and was not permitted to

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[4] Another example would be a trial attorney who suffers the loss of his left hand due to some defendant's negligence. The loss of his left hand would probably not affect the ability of the lawyer to be a skilled advocate. Nonetheless, plaintiff counsel would be entitled to recover for impairment of earning capacity inasmuch as he is now precluded from ever being able to function in a job which requires the use of one's left hand. It is the shortening of the attorney's economic horizon for which damages are awarded and not any actual reduction in earnings.

ambulate. From September until November 20, 1973, plaintiff moved about only on platform crutches; in November, 1973, he was permitted to change to a cane, and he has been required to walk with a cane ever since. At the present time, plaintiff continues to be affected by injuries of the right wrist, left heel, spine, chest, right ankle and right leg. As a result of the aforementioned physical restrictions, plaintiff has now also been forced to limit both family and recreational activities. With due regard for plaintiff's 41-year life expectancy and the disabling injuries previously detailed, this Court believes an award of $75,000 to be appropriate for pain, suffering and inconvenience.

In total, plaintiff is entitled to compensatory damages in the amount of $209,299.45. It remains to be considered, however, whether or not the equitable credit doctrine should be applied to the damage award.

EQUITABLE CREDIT DOCTRINE

Under the Equitable Credit Doctrine, damages are apportioned among the parties according to the extent of each one's fault. The Court calculates the award by assessing a prorated share of the damages against each party. The parties which would be considered in the case *sub judice* are:

1. Wheeling-Pittsburgh as owner *pro hac vice;*
2. Wheeling-Pittsburgh as stevedore;
3. American Commercial Lines.

The vitality of the equitable credit doctrine is uncertain. As Judge Aldisert stated in *Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 147 (3d Cir. 1977):

> ". . . the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question."

It is in this unsettled context that we address the merits of applying the equitable credit doctrine in the instant case.

The concept of comparative negligence is consistent with Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. "Because a literal reading of Section 5(b) creates irreconcilable conflict if the word 'negligence' is understood to mean any negligence at all, some alternative meaning which harmonizes the section must be adopted. This is simply and effectively achieved if 'negligence,' as used in Section 5(b) is recognized as contemplating the extent of fault in addition to its threshhold existence. Thus, the first sentence creates a right of recovery for injuries received to the extent such injuries were caused by the vessel, and the third sentence limits the recovery of longshoremen hired directly by the vessel only by the extent that their fellow workers caused the injury. Thus viewed, Section 5(b) is internally consistent and in accord with the general principles of maritime law." "EQUITABLE CREDIT: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the LHWCA," 35 MARYLAND L. REV. 353, 369 (1976). Any construction of 905(b) other than one embodying comparative negligence would result in an employee of an independent stevedore recovering full damages from a negligent vessel no matter how little negligent the vessel may have been.

The Equitable Credit Doctrine is a method of damage allocation which fosters fairness through the vehicle of proportionate fault. Plaintiff Griffith should not be permitted the double recovery of damages attributable to the negligence of Wheeling-Pittsburgh as stevedore in addition to workmen's compensation. Recovery in the case *sub judice* will therefore be limited to the proportionate damage caused by Wheeling-Pittsburgh in its non-stevedoring capacity and damage attributable to American Commercial Lines.

It is this Court's opinion that American Commercial Lines was 50% negligent, Wheeling-Pittsburgh in its non-stevedoring capacity 25% negligent, and Wheeling-Pittsburgh in its stevedoring capacity 25% negligent. Accordingly, damages are assessed against American Commercial Lines in the amount of $104,649.73 and against Wheeling-Pittsburgh in the amount of $52,324.87. Damages totalling $52,324.87 attributable to the negligence of Wheeling-Pittsburgh in its stevedoring capacity are not recoverable in view of the Equitable Credit Doctrine. Recovery for such negligence takes the form of plaintiff's workmen's compensation payments.

CONCLUSION

A standard of negligence imposing a duty to exercise reasonable care under all of the circumstances of the case and the equitable credit doctrine are evolving judicial principles not as yet firmly marked with the imprimatur of *stare decisis.* However, one of the foremost responsibilities of any system of jurisprudence is to actively engage in the pursuit of adaptable legal principles appropriate for a changing social environment. Adherence to precedent should not be so

talismanic that underlying social policies justifying change are muted. A general negligence standard of reasonable care under the circumstances and the equitable credit doctrine were adopted herein not because they are older than their competing alternatives but because this Court believes they are better. An appropriate Order will issue.

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District Judge.

ORDER

AND NOW, this 15th day of June, 1978, in accordance with the foregoing Opinion, IT IS ORDERED that plaintiff is hereby awarded damages against defendant American Commercial Lines in the amount of $104,649.73 and against defendant Wheeling-Pittsburgh in the amount of $52,324.87. Costs to be taxed equally between American and Wheeling-Pittsburgh.

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District Judge.

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Appendix B—Memorandum Opinion and Order.

AMENDED ORDER

RECEIVED
JUL 18 1978
THOMSON, RHODES & GRIGSBY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Filed July 17, 1978.)

THOMAS W. GRIFFITH,

Plaintiff,

v.

WHEELING-PITTSBURGH STEEL CORPORATION and AMERICAN COMMERCIAL LINES, INC.,

Defendants.

Civil Action No. 73-0706

AND NOW, this 17th day of July, 1978, IT IS ORDERED that the Memorandum Opinion and Order of this Court of June 15, 1978 in the above-captioned case be amended to delete the following sentence which appears on page 1, lines 3 and 4: "Jurisdiction is conferred on this Court by 28 U.S.C. § 1357(3)."

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District Judge.

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Supreme Court, U. S.
FILED
DEC 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-813

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

RESPONDENT THOMAS W. GRIFFITH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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3 U.S. Code Congressional & Administrative News, 92nd Cong., 2nd Sess., 1972, p. 4704 6
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-813

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

RESPONDENT THOMAS W. GRIFFITH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Question Presented

Should this Court review an opinion of the Court of Appeals that follows a previous decision rendered by this Court, and that is consistent with the legislative intent of the statute involved, and with the decisions of other Courts of Appeals?

Counter-Statement of the Case

On May 26, 1973, Respondent Thomas Griffith was thrown into the hold of a barge and seriously injured. The barge was owned by American Commercial Lines, Inc., and had been dispatched to Wheeling-Pittsburgh Steel Company, the Respondent's employer. The injury occurred because the rails upon which the barge covers rode were bent, and as a consequence, the covers did not roll freely; instead, they had to be forced closed with the use of cables attached to a crane.[1]

The barge supplied by the vessel owner, American Commercial Lines, Inc., to Wheeling-Pittsburgh Steel Corporation, contained numerous imperfections. The record supports the Trial Court's conclusion that the covers on the barge could not be closed because of any or all of the following conditions: a bent railing (129a-130a, 383a, 391a-392a), rusted cover wheels (165a, 205a, 301a, 370a), debris between the tracks (205a), missing and bent side locks (205a, 227a), a cover wheel which was off the track (235a), and a brownish rock called "spar" that clogged the channels in which the cover wheels rolled (305a-306a, 369a-370a). None of these conditions were caused by Wheeling-Pittsburgh Steel Corporation after receipt of the barge (453a); accordingly, they were present in the barge when possessed by the barge's owner, American Commercial Lines, Inc., and before its dispatch to Wheeling-Pittsburgh Steel Corporation.

Before sending the barge to Wheeling-Pittsburgh Steel Corporation, it was inspected by Franklin Merritt, an employee of American Commercial Lines, Inc., at their terminal at Glen Willard, Pennsylvania. His inspection consisted of

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[1] Wheeling-Pittsburgh Steel Corporation's answers to interrogatories Nos. 11, 34, 38, 39 and 41 from American Commercial Lines, Inc.

walking around the perimeter of the barge; he did not make an operating inspection of the covers to determine their condition or how they operated. Since the covers were closed at the time of his inspection, and he did not attempt to open them or to operate them, he failed to ascertain the condition of the rails or the wheels on which the covers move before the barge was dispatched to Wheeling-Pittsburgh Steel Corporation (12a, 17a, 21a-23a).

At the time that Franklin Merritt made this perfunctory inspection on behalf of American Commercial Lines, Inc., he was well aware that Wheeling-Pittsburgh Steel Corporation, when confronted by sticking barge covers, attempted to move the covers by using a double sling assembly, as was being done at the time of the accident, and had followed this practice for many years. American Commercial Lines, Inc. had never advised Wheeling-Pittsburgh Steel Corporation that this was an improper procedure, in spite of Merritt's knowledge (41a, 145a).

During the process of attempting to close the covers on the barge, the employees of Wheeling-Pittsburgh Steel Corporation found that they could not close the fifth cover by simply pulling it with the crane, in the normal manner in which covers are to move. Only after the employees of Wheeling-Pittsburgh Steel Corporation had utilized the eyelets on the edges of the covers, and had failed to budge the stuck cover, did they resort to the double sling method of closing it. This entailed attaching single cables to cover three and cover five, in the center, where the employees hoped they could get a better purchase on the covers. Because of the absence of eyelets in the center of the covers, Respondent Thomas Griffith had to remain on cover three to assure that the cable held on the rim of the cover, as the crane pulled the

cables taut. When the cover suddenly pulled loose and then flipped upwards in the air, Griffith was propelled into the hold and injured.

The trial testimony indicated that the next step in moving the unyielding covers, if the double sling method failed, would have been for the employees of the steel company to lift off the covers. This would have required that each cover be lifted off the barge by using the crane; since the covers weigh slightly less than ten thousand pounds, this procedure was time-consuming and considered a last resort (326a, 328a-329a). American Commercial Lines, Inc. had never recommended this procedure to the steel company before the accident (145a).

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeals Was Consistent With a Previous Opinion of this Court, With the Express Congressional Intent Underlying the Amended Longshoremen's and Harbor Workers' Compensation Act, and With the Decisions of Other Courts of Appeals.

The Petitioner has urged this Court to issue a writ ostensibly because of a conflict between the Court of Appeals' opinion and decisions rendered by other Courts of Appeals. A careful analysis of the opinion of the Third Circuit, however, demonstrates that it faithfully follows the decision of this Court in *Kermarec v. Compagine Generale Transatlantique*, 358 U.S. 625 (1959), and is consistent with the express Congressional intent underlying the Amendments to the Longshoremen's and Harbor Workers' Compensation Act, as well as the decisions cited by the Petitioner in its brief.

Since negligence is not defined by the Act, the Court of Appeals adopted a standard of reasonable care under the circumstances of each case. In explicating this standard, the Court said:

> "At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel know of or by the exercise of reasonable care could have discovered the condition on board ships that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against the damage. . . ." (App.A-14a)

In addition, the Court reaffirmed its position enumerated in previous decisions that:

> "The vessel has no general duty continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions)." (App.A-11a)

Employing this standard, the Court of Appeals found that the record revealed a clear breach of duty by the shipowner, Petitioner American Commercial Lines, Inc., in providing a glaringly deficient vessel that caused Respondent's accident.

The adoption by the Court of Appeals of this standard was faithful to the illuminating decision by this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In that case, Justice Stewart, speaking for the majority, eschewed the adoption of the mechanical distinctions between licensees

and invitees developed by the medieval law courts of England, refusing the import these subtle distinctions into the laws of admiralty. Instead, he opted for a more flexible test of negligence, imposing a uniform standard on shipowners of exercising reasonable care under the circumstances. In doing so, he said:

> It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. . . . We hold that the owner of a ship in navigable waters owes to all who are onboard for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." 358 U.S. at 630.

In addition to conforming to the injunction laid down by this Court in *Kermarec*, the opinion by the Court of Appeals was faithful to, and consistent with, the wishes of the authors of the Amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1977. As expressed in the House Report on that statute:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." (3 U.S. Code Congressional and Administrative News, 92nd Cong. 2d Sess., 1972, p. 4704.)

Finally, a careful reading of the decision of the United States Court of Appeals for the Third Circuit, and particularly the factual matrix that supports that opinion, easily distinguishes it from the cases cited in the Petitioner's brief,

and reveals that the inconsistency claimed by the Petitioner is a fanciful product of the Petitioner's imagination.

To verify this, it is instructive to discern first what was not involved in the decision sought to be reviewed. The Court below was *not* dealing with a deficiency or a hazardous activity created by the stevedore working on the vessel. It was squarely faced with the problem of responsibility for admitted deficiencies in a vessel owned by the Petitioner, present while the vessel was in the possession of the Petitioner, and productive of the injuries sustained by the Respondent. This factual disparity represents a significant difference between the present case and the cases cited by Petitioner, and claimed to create an inconsistency between the various Courts of Appeals.

Close examination of the cases cited by the Petitioner makes clear their differentiation from the present case, and the fact that they would have been decided the same way employing the legal test used by the Third Circuit Court of Appeals, if their factual setting had been presented to that Court. Three of the cases cited by the Petitioner involve claims by longshoremen who were injured solely because of the negligence of their employer, the stevedore. For example, in *Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978), a verdict for the defendant was affirmed, on the grounds that the "stevedore created the alleged defect." 576 F.2d at 1079. Likewise, in *Munoz v. Flota Merchante Grand Combiana, S.A.*, 553 F.2d 837 (2d Cir. 1977), affirmance of a defendant's verdict was based on the fact that the stevedore "stowed the cargo in such a manner as to create a latent, dangerous condition upon which one of its employees was injured." 553 F.2d at 840. Finally, in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), one longshoremen was

overcome by fumes caused by a defective blower provided by his employer, the stevedore, while the other plaintiff longshoreman was struck by a load dropped from a boom operated by the stevedore. Verdicts for the vessel were affirmed, since it was "clear that the vessel has no liability under section 905(b) since the sole cause of injury was the negligence of the stevedore." 546 F.2d at 1240.

The three cases discussed above are cited by the Petitioner as cases that create a conflict between the various Courts of Appeals. However, by referring back to the standards quoted from the opinion of the Third Circuit Court of Appeals, it is obvious that the Court would have arrived at the same result as the cited decision, using its test for negligence, and that the previous decisions by the Third Circuit Court of Appeals in *Brown v. Ivarans*, 545 F.2d 854 (3d Cir. 1976), *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977), and *Rich v. United States Lines*, 596 F.2d 541 (3d Cir. 1979), bring that Circuit squarely into line with the cases cited by Petitioner.

The remaining case cited by the Petitioner, *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), underscores the common ground on which all of these cases stand, rather than pointing up an inconsistency between the Courts of Appeals' opinions. In *Canizzo*, a verdict for the longshoreman was affirmed, on the basis of proof that the shipowner should have known of the presence of the grease that caused the longshoreman's fall. On facts similar to the present case, the Court adopted a rationale for affirming the verdict that virtually echoes the standard adopted in the present case. It said:

> "A shipowner, however, can only be liable under 343A if he knows or should have known of the obviously dangerous, but unavoidable condition."

Thus, the factual background, the result of the trial and appeal, and the legal test for negligence employed in that case virtually duplicates the instant case.

In summary, the opinion of the Court of Appeals shows a faithful adherence to the precepts set down by this Court in *Kermarec*, and to the goals of the authors of the Act. It varies from the opinions produced by several other Courts of Appeals only because of the different factual setting confronting the Court, and it implicitly indicates that the Court, if confronted by the facts posed by the cases cited as inconsistent, would have settled on the same result reached in those cases. Thus, the petition filed here represents, when reduced to its essentials, an invitation to this Court to enter a factual thicket that is of no great national importance, and is of concern only to the parties to this immediate litigation. There is no compelling reason why this Court, already facing the exigencies of deciding cases national in scope and interest, should undertake to review factual findings by a lower court, or to decide a case that when reduced to its basics, involves nothing more than the issue of the quantum of proof necessary to sustain a longshoreman's claim.

Conclusion

The present case is an ordinary garden-variety negligence action, posing the basic issue of the extent of proof necessary to sustain a longshoreman's claim. The opinion of the Court of Appeals follows the law of this Court and conforms to the intent of the legislation involved. Except for factual differences, it does not depart from the decisions of other Courts of Appeals. No issue of great moment or of overriding national importance is presented by the case, and only the present litigants have an interest in its outcome. For all these reasons, the Writ of Certiorari should not issue.

Respectfully submitted,

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Thomas W. Griffith.

No. 79-813

MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN COMMERCIAL LINES, INC., PETITIONER

v.

THOMAS W. GRIFFITH AND
WHEELING-PITTSBURGH STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act establishes a general negligence standard in suits by longshoremen against vessel owners.

STATUTE INVOLVED

Section 5(b) of the Longshorhmen's and Harbor Workers' Compensation Act, as added by Section 18(a) of the Longshoremen's and Harbor Workers' Compensation

Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U.S.C. 905(b), provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT

On May 26, 1973, respondent Thomas Griffith, a longshoreman in the employ of respondent Wheeling-Pittsburgh Steel Corporation ("Wheeling"), was injured while loading a coal barge owned by petitioner. The accident occurred when Griffith and others attempted to close the barge covers, which were difficult to move because "[t]he wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent" (Pet. App. 5a). In order to close one of the defective barge covers, the stevedore crew attached a

cable to the cover from a crane located on the seawall. Because the eyelets on the center of the cover were missing, Griffith and another employee had to stand on the cover to keep the cable hooks in place under the rim of the cover. When tension was applied to the cable, the cover began to rise and Griffith and the other employee stepped back onto another cover. That cover moved, however, and both longshoremen fell into the ship's hold, sustaining injuries (Pet. App. 3a-5a, 15a-16a).

Thereafter, Griffith filed suit in the United States District Court for the Western District of Pennsylvania against petitioner and Wheeling under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as added by Section 18(a) of the LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U.S.C. 905(b). He claimed that petitioner, as owner of the barge, and Wheeling, as *pro hac vice* owner of the barge,[1] were liable for their negligence in connection with the defective barge cover. The district court granted Wheeling's motion for summary judgment (384 F. Supp. 230 (1974)), but the court of appeals reversed and remanded the case for further proceedings against both defendants (521 F. 2d 31 (1975), cert. denied, 423 U.S. 1054 (1976)).

Following a bench trial on remand, the district court held that both petitioner and Wheeling were negligent and that Griffith had suffered more than $200,000 in damages. The court first concluded that the critical question in a longshoreman's suit under Section 5(b) is whether the vessel owner had exercised due care under all the attendant circumstances. The court rejected petitioner's

[1]Three days prior to the accident, petitioner had delivered the barge to Wheeling for use in its coal fleet (Pet. App. 4a).

contention that Section 5(b) imposes on vessel owners only the limited duty owed by a land owner to an invitee (see *Restatement (Second) of Torts* §§ 343 and 343A (1965)) rather than the general duty of care applicable in ordinary negligence actions (Pet. App. 32a-34a). Focusing on petitioner's delivery of a barge with a defective and rusted cover, the court further noted that petitioner's "pervasive and flagrant" negligence would satisfy either standard (*id.* at 35a). Finally, the court found that petitioner had been 50% responsible for the accident and that Wheeling had also been 50% responsible—25% in its capacity as *pro hac vice* owner and 25% as stevedore (*id.* at 41a).[2]

All parties appealed, and the court of appeals affirmed in part and reversed in part (Pet. App. 1a-25a; 610 F. 2d 116). Concluding that petitioner's restrictive interpretation of Section 5(b) was inconsistent with both congressional intent and the relevant decisions of this Court (Pet. App. 11a-14a),[3] the court of appeals held that Section 5(b) "imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case'

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[2]The district court correctly concluded that Wheeling as an employer was not liable to Griffith for its actions as stevedore. It erroneously held, however, that Griffith could not recover from petitioner or Wheeling as *pro hac vice* owner that portion of his damages attributable to his employer's negligence. See *Edmonds* v. *Compagnie Generale Transatlantique*, No. 78-479 (June 27, 1979). The court of appeals reversed this aspect of the district court's order (Pet. App. 5a-7a).

[3]See *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*; *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

that would be applicable to a land based business" (*id.* at 14a). The court stated that (*id.* at 14a-15a):

> the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Applying this standard to the facts of the case, the court of appeals agreed with the trial judge that petitioner had been negligent in delivering a barge with a rusted, defective cover (*id.* at 15a-16a). With regard to Wheeling's proportionate fault and status as *pro hac vice* owner, however, the court of appeals remanded the case for further findings (*id.* at 17a-20a, 23a-24a). See also note 2, *supra*.[4]

DISCUSSION

Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as added in 1972, provides that a vessel owner is liable to a longshoreman for an "injury * * * caused by the neligence of a vessel." 33 U.S.C. 905(b).[5] Congress did not specify the precise

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[4]These other issues are not before the Court.

[5]In 1972, Congress amended the LHWCA to relieve vessel owners of absolute liability for the unseaworthiness of their vessel. At the same time, Congress made clear that vessel owners would continue to be responsible for their negligent acts and omissions. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4-8 (1972); *Bloomer* v. *Liberty Mutual Ins. Co.*, No. 78-1418 (Mar. 3, 1980), slip op. 9; *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*, slip op. 5.

standard of negligence to be applied in actions brought under Section 5(b), however, and the courts of appeals have formulated different approaches to the question of owner liability. Relying on *Restatement (Second) of Torts* §§ 343 and 343A (1965), several courts of appeals have concluded that Section 5(b) renders a vessel owner liable only in those circumstances in which an owner of land would be accountable to an invitee. See, *e.g.*, *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233, 1237-1238 (5th Cir. 1977); *Anuszewski* v. *Dynamic Mariners Corp.*, 540 F. 2d 757, 759 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505, 508-509 (2d Cir. 1976). More recently, other courts of appeals, including the court below, have rejected the analogy between a land owner and a vessel owner and instead have concluded that Section 5(b) imposes a general duty on vessel owners to exercise reasonable care in all circumstances. See, *e.g.*, *Johnson* v. *A/S Ivarans Rederi*, 613 F. 2d 334, 346-349 (1st Cir. 1980); *Santos* v. *Scindia Steam Navigation Co.*, 598 F. 2d 480, 489-491 (9th Cir. 1979), petition for cert. pending, No. 79-512.

Despite this apparent conflict among the courts of appeals, we submit that plenary review of this case by the Court is unwarranted. First, it is unlikely that the different standards articulated by the courts of appeals would produce different results in the large majority of cases.[6] Under neither standard can a vessel be held liable

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[6]As an abstract matter, we believe that the court of appeals has correctly construed Section 5(b). Although Congress indicated that Section 5(b) incorporates "land-based" principles of negligence (see, *e.g.*, H.R. Rep. No. 92-1441, *supra*, at 4, 6; *Luhrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364, 366 (2d Cir. 1978)), it did not state that vessel owners should be treated as land owners in all circumstances. To the contrary, the language and legislative history of Section 5(b) strongly suggest that Congress intended the courts to

unless it fails to exercise reasonable care to protect the longshoremen against a danger that was known or could have been known to it. Likewise, under neither standard can a vessel be held liable solely because of the stevedore's negligence. And even under § 343A of the *Restatement*, a vessel may in some circumstances be liable for injuries caused by an open and obvious danger to a longshoreman despite the fact that the danger was created by the stevedore. See, *e.g.*, *Canizzo* v. *Farrell Lines, Inc.*, 579 F. 2d 682, 685-686 (2d Cir.), cert. denied, 439 U.S. 929 (1978); *Chavis* v. *Finnlines, Ltd.*, 576 F. 2d 1072, 1078-1079 (4th Cir. 1978); *Wiles* v. *Delta Steamship Lines, Inc.*, 574 F. 2d 1338 (5th Cir. 1978); *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F. 2d 364 (2d Cir. 1978), on remand, No. 79-7228 (2d Cir. Mar. 31, 1980); *Gay* v. *Ocean Transport & Trading, Ltd.*, *supra*, 546 F. 2d at 1240-1242. But cf. *Cox* v. *Flota Mercante Grancolombiana*, 577 F. 2d 798 (2d Cir.), cert. denied, 439 U.S. 881 (1978).[7]

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apply general negligence principles in these cases. See H.R. Rep. No. 92-1441, *supra*, at 4-8. As the court of appeals pointed out (Pet. App. 12a-14a), that conclusion also seems more consistent with this Court's analysis in *Edmonds* v. *Compagnie Generale Transatlantique*, *supra*, and *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*, 358 U.S. at 630-632, and with Congress' intent to reject common law rules of contributory negligence and assumption of risk. See generally *Johnson* v. *A/S Ivarans Rederi*, *supra*, 613 F. 2d at 337-349. Finally, adoption in this context of the limitations imposed on a landowner's liability to an invitee "would undercut Congress' intention to reduce the frequency of accidents by creating economic incentives to provide safer working conditions." *Santos* v. *Scindia Steam Navigation Co.*, *supra*, 598 F. 2d at 487.

[7]Indeed, it has been suggested that *Restatement (Second) of Torts* § 343A (1965) may be an inappropriate guide because it constitutes too liberal a standard of liability. See *Riddle* v. *Exxon Transportation Co.*, 563 F. 2d 1103, 1112-1113 (4th Cir. 1977); *Hurst* v. *Triad Shipping Co.*, 554 F. 2d 1237, 1249-1250 n.35 (3d Cir.), cert. denied, 434 U.S. 861 (1977); *Canizzo* v. *Farrell Lines, Inc.*, *supra*, 579 F. 2d at 688 (Friendly, J., dissenting).

More important, even assuming that the disagreement among the courts of appeals is a matter of substance rather than semantics, this case does not present an occasion to resolve the conflict. As the district court noted and as the facts clearly show (Pet. App. 9a, 33a-34a, 35a), petitioner's negligent behavior in delivering a rusted, defective, and therefore hazardous vessel would constitute a basis for liability under either standard. See, *e.g.*, *Johnson* v. *A/S Ivarans Rederi*, *supra*, 613 F. 2d at 351; *Santos* v. *Scindia Steam Navigation Co.*, *supra*, 598 F. 2d at 489-490; *Canizzo* v. *Farrell Lines, Inc.*, *supra*, 579 F. 2d at 685; *id.* at 688 (Friendly, J., dissenting); *Chavis* v. *Finnlines, Ltd.*, *supra*; *Lubrano* v. *Royal Netherlands Steamship Co.*, *supra*; *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F. 2d 331, 334 (5th Cir. 1977); *Bess* v. *Agromar Line*, 518 F. 2d 738, 741 & n.8 (4th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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